

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 3:20-CV-06754-WHA

SONOS, INC.,)
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PLAINTIFF,)
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-v-)
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)
GOOGLE, LLC,)
)
)
DEFENDANT.) San Francisco, California
) August 10, 2023
)

TRANSCRIPT OF MOTIONS PROCEEDINGS

BEFORE THE HONORABLE WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE

Appearances: (On Page 2.)

Proceedings recorded by Digital Audio Recording, and transcript prepared utilizing computer-aided transcription.

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17 ALSO PRESENT:

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(Call to the order of the Court at 8:34 a.m.)

Next case. Another Quinn Emanuel case.

Let's go to the next case, the patent case.

Good morning.

THE COURTROOM DEPUTY: Calling Civil Action 20-6754,
vs Google.

Counsel, please approach the podium and state your appearances for the record beginning with counsel for plaintiff.

MR. SULLIVAN: Good morning, Your Honor. Nice to see you again. Sean Sullivan on behalf of Sonos.

THE COURT: Welcome back.

MR. SULLIVAN: Would you like me to introduce the whole team, or ...

THE COURT: I think you should at least say who's here for appearances purposes. And this is being recorded. It's not -- we don't have a reporter, but it --

THE COURTROOM DEPUTY: We do, Your Honor.

THE COURT: Oh, we do?

THE COURTROOM DEPUTY: We've got a remote reporter.

THE COURT: Oh, I didn't know that. Who is that?

Oh, great. Okay. Then we do have a reporter.

MR. SULLIVAN: Yes. So Your Honor, I have Rory Shea, Clem Roberts, Cole Richter, Dan Smith, Libby Moulton and Alyssa Caridis.

1 THE COURT: Welcome to all of you.

2 All right. Mr. Pak, your turn.

3 MR. PAK: Good morning, Your Honor. Sean Pak on
4 behalf of Google, and with me here today is Lindsay Cooper,
5 Jocelyn Ma, Lana Robins, Iman Lordgooei, and we have our
6 client representative Patrick Weston, as well.

7 THE COURT: Thank you. Welcome.

8 All right. We've got a lot of motions here and a
9 lot of -- there's no way we can go through everything, so I
10 will go through some of it, and I want to start with the
11 affirmative defense of prosecution laches.

12 All right. So Mr. Pak, you get to go first and
13 explain that.

14 MR. PAK: Thank you, Your Honor.

15 My partner, Imam Lordgooei, will handle the
16 argument.

17 THE COURT: Let's start -- all right. Give me your
18 name again.

19 MR. LORDGOOEI: This is Imam Lordgooei on behalf of
20 Google.

21 THE COURT: Thank you.

22 Now, let's go back to basics. How did this doctrine
23 arise? What was the first Supreme Court decision?

24 MR. LORDGOOEI: So I believe -- I mean, you know,
25 it's a hundred- year-old doctrine. It arose --

1 THE COURT: What was the first one?

2 MR. LORDGOOEI: I believe it was in the context of
3 just parties, patentees that were extending the life of their
4 patents by delaying prosecution.

5 THE COURT: What was the name of the case? You
6 don't know.

7 Do you know the name of the case?

8 MS. MOULTON: I believe the first case was *Webster*
9 *Electric*.

10 THE COURT: All right. This is very important to
11 me. You lawyers should come prepared and know this cold and
12 know the doctrine, and to me this is the most important issue
13 tendered on this entire group of motions is prosecution
14 laches, and so you should have known that.

15 All right. Go ahead. Give me your fact -- give
16 me -- explain to me why you think it should apply here.

17 MR. LORDGOOEI: So as Your Honor noted, it's a
18 doctrine that goes all the way back to *Webster*. This is a
19 1924 case. Basically the point of the doctrine is to prevent
20 inexcusable delays in the prosecution of patents, which, in
21 the interim, during the delay, period of delay, there's
22 prejudice to the public or other parties as a result of the
23 delay.

24 Now, the typical, the protocol typical fact pattern,
25 as Sonos has noted, that applied in the context of prosecution

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1 laches for years was the issue of submarine patents. And so
2 submarine patents were a situation where parties would file
3 their patents, abandon, file a continuation, abandon, file a
4 continuation, and through this process they were able to
5 extend the issuance of their patents for years, decades
6 sometimes, at a point where industry had already released
7 products. And at that point they're able to basically surface
8 their submarine patents, it's issued, it has 17 years from
9 issuance.

10 So that was the pre-GATT amendments to the patent
11 statutes.

12 Post-GATT, this is 1994, patents have a 20-year term
13 from the priority date, and so submarine patents are no
14 longer, effectively no longer an issue under the traditional
15 notion of submarine patents, where parties were extending and
16 delaying issuance of the patents for the purpose of extending
17 the expiration date.

18 Now, Sonos has argued that post-GATT this is no
19 longer a defense, and we just believe that that's incorrect.
20 The underlying defense is an equitable defense. It's up to
21 the discretion of the Court. And the purpose of it is to
22 prevent abuse of PTO procedures. Even if you engage in
23 prosecution under the PTO rules, you've done it in a way
24 that's inequitable.

25 And so what are the factors that the Court looks at?

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1 It's the totality of the circumstances around delay and
2 whether it's unreasonable and inexcusable in terms of delay.
3 And there are post-GATT patents that have been found by other
4 district courts, district courts in New Jersey -- this is the
5 *Jazz Pharma* case -- district courts in Delaware -- this is the
6 *Natera* case, that have found that this is still a viable
7 defense even for post-GATT patents.

8 And so in those cases, for example, the Court looked
9 at, in *Jazz Pharma* it was a delay in the litigation that
10 resulted from delays in the prosecution of the patentee's
11 patents.

12 In *Natera* --

13 THE COURT: Wait. I'm following this.

14 Well, how did the litigation result in a delay in
15 prosecution?

16 MR. LORDGOOEI: So I believe in that case it's a
17 pharma case, and so procedurally I'm not a hundred percent
18 sure how it came about, but I believe the party had sued for
19 release of its generic drug. And so by extending and delaying
20 the prosecution of the patents, you're not necessarily
21 extending the expiration date, but you are delaying the period
22 of time that the parties are in litigation on that patent.
23 And the same issue came about in *Natera*, where the delay was
24 explained by the Court, and I can pull this up.

25 So the Court explained in *Natera* that: "*Natera* has

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1 improperly sought to delay competition in the IVD market by
2 pursuing patent claims it did not invent."

3 And so I think in this case the fact pattern, as
4 Your Honor has heard through numerous briefs that we filed on
5 this written description issue throughout the trial, the fact
6 pattern is actually worse than a submarine patent, because in
7 this case Sonos filed its patent originally in the provisional
8 patent that they say discloses overlapping zone scenes in
9 2006. It was not until August of 2019 when they amended their
10 specification to clearly, according to them, clearly disclose
11 the concept of overlapping zone scenes.

12 And as Your Honor has noted throughout the trial,
13 the single inventive aspect of overlapping zone scenes is
14 found in the written description of the specification in
15 Column 10 of the patent in the one sentence that they added in
16 August of 2019. This is the "all the zones" language that
17 they added to the specification. And so however thin that
18 disclosure is, it was added in August of 2019, 13 years after
19 they had filed the original provisional application.

20 And so in reading Sonos' opposition, I don't think
21 that they've ever attempted to even explain that delay. All
22 they say is, we didn't delay disclosure of this invention;
23 everything you needed was in the prior 2006 provisional; it
24 was in our original patent that was issued in 2013, the '853
25 patent; and so Google, you are on notice, the public was on

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1 notice of this overlapping zone scenes invention. Which, we
2 believe, based on all the prior briefing and all the prior
3 arguments on written description, we believe that is
4 categorically false.

5 For example, in Docket 729, that was one of the
6 motions that we filed, we cited the *Crown Operations* case from
7 the Federal Circuit, this is 289 F.3d 1367, for the notion
8 that: "Novel aspects of the invention cannot be left to
9 inference, they have to be expressly and explicitly disclosed
10 in the specification."

11 We also cited the *PowerOasis* case, 322 F.3d 1299,
12 for the proposition that the invention must be, again,
13 expressly disclosed in the specification. You can't say that
14 a person of ordinary skill viewing the specification would
15 have understood that the invention was disclosed because it's
16 obvious. It's not an obviousness test.

17 And so if you look at what they've pointed to, what
18 they've consistently pointed to for written description
19 support for this invention and what Your Honor relied on in
20 issuing the written description order, that sentence that they
21 added was not in the original specification, it was added for
22 the first time in August 2019.

23 THE COURT: Well, what do you -- yes, but they say
24 it was incorporated by reference and that the rules allowed
25 incorporation by reference. And what do you say to that

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1 point?

2 MR. LORDGOOEI: So this goes to the abuse of PTO
3 procedures.

4 Under PTO procedures -- and we would -- and we've
5 argued to Your Honor that they've incorporated by reference
6 what they've incorporated by reference, the provisional
7 patent, doesn't expressly disclose that one sentence that they
8 added in the context of zone scenes. And so if you recall,
9 Your Honor, in the prior briefing and arguments, what we
10 showed Your Honor was that the Figure 5B that they
11 identified -- and maybe we can put up a slide to remind His
12 Honor of this.

13 Mr. Wilson, can we have the affirmative defense
14 slide ... Slide 17.

15 THE COURT: Seventeen? What do I have to do to see
16 it?

17 MR. LORDGOOEI: Your Honor, I'm happy to hand up
18 copies of the presentation, as well.

19 THE COURT: All right. Well, go ahead and hand them
20 up, but I'd prefer to see it on the screen. Well, I can't
21 read it.

22 All right. Which slide do you want me to look at?

23 MR. LORDGOOEI: It's 17, Your Honor. And I'm happy
24 to proceed when you're there.

25 THE COURT: All right. What is your point about

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1 this one?

2 MR. LORDGOOEI: This is what they claim was
3 incorporated by reference and should have put the public,
4 including Google, on notice of their alleged invention.

5 Figure 5B from the patent is the bottom half of this
6 figure from the provisional patents. This is the zone menu.

7 Now, what they didn't disclose is that, and as we
8 point out to Your Honor in prior briefing, is that the top
9 half of this figure expressly shows that the menu being
10 displayed is the zone-linking menu. So this is a zone group,
11 not a zone scene. And the language that they added to the
12 specification is at the bottom. It says: "The list of zones
13 in the screen above includes all the zones in the system,
14 including the zones that are already grouped."

15 THE COURT: You're doing a good job, but I'm just
16 not remembering this.

17 The two little small pictures over on the left, are
18 those in the patent as issued in 2022, or is it -- are these
19 from the original attachments to the 2006?

20 MR. LORDGOOEI: These are from the provisional
21 patents.

22 THE COURT: In the actual -- in the patent itself,
23 or were they attachments, the attachments?

24 MR. LORDGOOEI: This is from the provisional patent
25 that Sonos alleges was incorporated by reference into the

1 patents as issued. The actual figure that you see here was
2 chopped in half, and only the bottom half was presented as a
3 figure in the patent itself as Figure 5B.

4 THE COURT: All right. So the figure that was in
5 the material that was incorporated by reference has this,
6 these two pictures in it with the arrow; is that right?

7 Let me hold it up so you can see.

8 MR. LORDGOOEI: Yes.

9 THE COURT: You see I'm -- this part right here, was
10 that in all of that in the thing that was attached?

11 MR. LORDGOOEI: Everything you see on this slide,
12 Your Honor, minus the annotations, was part of the provisional
13 patent filed in 2006, which was incorporated by reference into
14 the asserted patents.

15 THE COURT: I'm sorry. See, you're saying it in a
16 slick way that I -- there was something that was incorporated
17 by reference to the 2006. Was this material --

18 MR. LORDGOOEI: This is part of the 2006.

19 THE COURT: -- in that, or was it in the figures
20 that were part of the 2006 that was later incorporated and
21 used for the 2018?

22 MR. LORDGOOEI: Let me take a step back.

23 In 2006, Your Honor, Sonos filed its provisional
24 patent application. And if you recall, the provisional
25 included two documents, an Appendix A and an Appendix B that

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1 were attached to that provisional patent application.

2 THE COURT: All right.

3 MR. LORDGOOEI: So all of that was part of the
4 provisional.

5 This is from that Appendix A that was filed.

6 THE COURT: All right. That's what I wanted to
7 understand. Okay. So, now, I understand that.

8 Make -- now, tell me what your point is about this.

9 MR. LORDGOOEI: So the point is that this is not a
10 disclosure of overlapping zone scenes, even if it's
11 incorporated by reference properly into the asserted patents.
12 This didn't disclose overlapping zone scenes, because this is
13 a menu on the Sonos handheld device that shows how you can add
14 and subtract zone players from different zone groups, from a
15 zone group of which they are a member. So it shows that you
16 can go in the zone-linking menu, which is next to the scenes
17 menu. The scenes menu is in the middle, so this is not even
18 talking about scenes, zone scenes. And so a user can click on
19 zone linking, and for a currently configured group they can
20 use the checkmarks to add and remove speakers or zone players
21 from that group.

22 Now, importantly, Your Honor, this same document
23 earlier explains, and we've pointed this out in our prior
24 briefing, that it is not expected that the zone scenes should
25 be set up using the handheld controller.

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1 And so what are we looking at? What has Sonos been
2 pointing to throughout this issue and throughout trial as
3 supposedly disclosing the configuration of overlapping zone
4 scenes? It's the handheld controller. It's the user
5 interface on the handheld controller which this very document
6 says is not expected to be used to set up zone scenes.

7 THE COURT: All right. Which -- you said something
8 earlier about only the top half was, and I didn't follow your
9 point. Only the top half of what?

10 MR. LORDGOOEI: And so this figure is part of the
11 provisional which Sonos says was incorporated by reference.
12 If you look at the patents themselves as they were filed, the
13 patent applications as filed and as issued, there is a Figure
14 5B that was --

15 THE COURT: That's '885.

16 MR. LORDGOOEI: In both the '885 and the '966 --

17 THE COURT: All right.

18 MR. LORDGOOEI: -- there's a Figure 5B, which is
19 basically a replication of only the bottom half of this
20 figure.

21 THE COURT: All right. So your point is -- well,
22 and in the '885 specification, how is Figure 5B presented?

23 MR. LORDGOOEI: And so in the specification, Figure
24 5B is presented as simply a menu for potentially setting up a
25 zone scene. Now, the issue is that it only talks about

1 setting up a zone scene, it doesn't talk about setting up
2 multiple zone scenes, multiple overlapping zone scenes, as
3 part of the disclosure and the specification. And so
4 therefore that is why, in August 2019, when Sonos was
5 attempting to claim overlapping zone scenes, they had to go
6 back, amend their specification to add this additional sentence
7 that: "The list of zones in the screen above includes all the
8 zones in the system, including the zones that were already
9 grouped."

10 And so their argument has been that that shows,
11 since you've already grouped certain zones as part of this
12 menu, then that means you could have already had a prior zone
13 scene, and now you're creating a new zone scene, and therefore
14 that discloses overlapping zone scenes. And the fundamental
15 issue with that, Your Honor, as we've pointed out time and
16 again, is that in the provisional where this came up, where
17 this sentence came up, it's in the context of zone groups, not
18 zone scenes. And, in fact, the provisional says you should
19 not use, it is not expected that you would use this user
20 interface to set up a zone scene.

21 And by omitting that and by pulling the sentence
22 from the portion of the specification that has nothing to do
23 with zone scenes, our position is that they abused the PTO
24 procedures for amending their specification to improperly add
25 new matter, and they duped the examiner.

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1 Yeah, this sentence appears in the context of this
2 figure, and this figure, part of it is part of the patent
3 specification --

4 THE COURT: All right. How did they get this past
5 the examiner, then?

6 MR. LORDGOOEI: Well, that's another problem with
7 the prosecution of these two patents.

8 Can we pull up the next slide, Mr. Wilson, Slide 18?

9 So these patents are part of the continuation chain
10 as Your Honor recalls, and Sonos has pointed to some of the
11 prior patents in their continuation chain to say that they did
12 nothing wrong, this is just part of regular prosecution, and
13 they disclosed their invention in prior patent applications,
14 but the problem with that is, Your Honor, for example, the
15 '853 patent -- this is TX-3888, when they disclose that to the
16 patent office, when they filed that with the patent office,
17 that contained none of the language in the specification that
18 they subsequently amended to add in 2019; it was filed under
19 regular PTO procedures, so the timeline for prosecution was
20 the typical timeline; and they actually didn't provide the PTO
21 examiner with any documents to review in terms of prior art.
22 The examiner went out and he found seven documents on his own,
23 and you can see all of that on the front page of TX-3888.

24 THE COURT: What was the year of the '853?

25 MR. LORDGOOEI: The '853 I believe was filed in

1 2007, and that's the one that issued in 2013.

2 THE COURT: And what about the other ones on this
3 page?

4 MR. LORDGOOEI: So the other ones -- and I think
5 Sonos' attorney may tell you that -- just to take a step back,
6 the point I'm making in terms of the prosecution timing, Your
7 Honor, the asserted patents were filed under the PTO Track 1
8 procedure, which requires an expedited, accelerated
9 examination by the examiner. These other patents not filed
10 under Track 1.

11 Now, Track 1 only became available, I believe, after
12 the '853 patent was filed. But even for the '228 patent and
13 the '206 patent, which were filed post-2011, those two could
14 have been filed under Track 1, expedited. They were not.
15 They were filed as regular patents, regular prosecution. For
16 the '228 patent, the examiner looked over 80 documents, 80
17 prior art documents, that were provided to him. For the '206
18 patents, that balloons to 180 documents.

19 And then we get to the asserted patents that were
20 filed in 2019. All of a sudden they file expedited, and they
21 dump over 1800 documents on the examiner to review, over
22 70,000 pages of documents for the examiner to review as part
23 of this prosecution. And at the same time they're amending
24 their specification to put in this additional language, and
25 they're claiming to the examiner, they're representing to the

1 examiner that it is -- it is not new matter, even though as
2 we've shown Your Honor through the prior briefing and the
3 prior arguments, it expressly was new matter. And so this --

4 THE COURT: Well, what did the -- explain how it
5 came up with the exam -- when the amendment was made, did the
6 examiner push back and say, oh, no, or give me the exact give
7 and take in the prosecution history on when the amendment was
8 made and what the -- what was said to the examiner and what
9 the examiner said in reply.

10 MR. LORDGOOEI: So Mr. Pak can walk you through the
11 prosecution history, but in general, Your Honor, the back and
12 forth constituted the examiner raising, if you recall, the
13 Yamaha DME reference, in which the examiner took official
14 notice that creating and saving groups would have been obvious
15 in view of the Yamaha DME. And so as part of that procedure,
16 Sonos engaged in amending the claims to add the stand-alone
17 limitation and at a certain point I believe also added the
18 written description support for the overlapping zone scenes.
19 And I can't recall right now if it was before or after the
20 Yamaha DME discussion.

21 MR. PAK: Yes, Your Honor, that's correct.

22 So I'll just be very brief, because I do want to
23 turn it back to the core argument.

24 If Your Honor recalls, we discussed during trial
25 there was a piece of prior art called Yamaha DME that

1 disclosed creation and setting up of a number of zone scenes.
2 I think it was close to a thousand different zone scenes.
3 That was presented as prior art invalidating then-pending
4 claims, which did not have the language about "while operating
5 in the standalone mode." And then the patentee amended claim
6 language to add the "while operating in standalone mode, as
7 well as amending the specification to add the new matter that
8 Mr. Lordgooei talked about.

9 One thing that's critical is there was no
10 substantive discussion during prosecution of the '885 or the
11 '966 patent on whether that new amended language in the
12 specification, the sentence that was taken out of context
13 with -- and attached to a figure that has the top-left, top
14 portion taken out, whether that was a new matter or not. So
15 that was not something that was substantively discussed during
16 prosecution of the '885 and '966. Instead, the focus of that
17 prosecution was: Did the amended claim language overcome the
18 Yamaha DME reference, and the examiner found it did, and that
19 pertains to some of the other issues that we'll talk about in
20 the other motions, as well.

21 They have pointed in the past, we've spent some time
22 during trial, to another patent. I believe it's one of the
23 ones that Mr. Lordgooei showed you, where there was discussion
24 of new matter, whether something was being added that has
25 support or not. And in the past, Sonos has argued that there

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1 should be some deference given to that ruling or that decision
2 by the patent examiner on the new matter issue. However, as
3 we pointed out in oral argument and also in briefing on that
4 issue, that patent, the predecessor patent, did not have claim
5 language directed to overlapping zone scenes, it was talking
6 about just setting up a plurality of zone scenes.

7 And so that examiner was not looking at the question
8 of whether this one sentence plucked out of the provisional
9 which was talking about zone groups, and added to a figure
10 that was chopped off in half and then presented for the first
11 time as a zone scene figure, whether that constituted new
12 matter. So that's number one, that the prosecution history
13 does not provide any clear evidence of the examiner looking at
14 the very issue that Mr. Lordgooei has been discussing with
15 you.

16 But in any event, regardless of what the patent
17 office does, as Your Honor well knows, we're only talking
18 about written description for issued patents in patent
19 litigation matters. Every examiner has a duty to look through
20 the claim language and make his own decision, but that is not
21 a substitute for judicial review of whether, in fact,
22 collecting all the evidence in the case, there is written
23 description or not.

24 And so for those reasons, we believe that, as we
25 talk about before, we think that Your Honor could vacate your

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1 prior Honor's ruling.

2 THE COURT: You're sliding off into a different
3 subject.

4 MR. PAK: Sorry. Let me turn it back --

5 THE COURT: I'm interested in laches, prosecution
6 laches.

7 MR. LORDGOOEI: So to --

8 THE COURT: I don't think anybody answered my
9 question. I'll give you one more chance. On any of these
10 patent -- did this language get slipped into any other
11 specification other than '885 and '966? For example --

12 MR. LORDGOOEI: It was not in the specification of
13 any of the patents that are on the screen. I believe as
14 Mr. Pak noted, it was added to a different sibling patent to
15 the '885 and '966, but it -- that amendment also arose at the
16 same time with the amended --

17 THE COURT: Well, did the examiner say anything
18 about that amendment?

19 MR. LORDGOOEI: I don't believe so.

20 So the issue of whether the amendment constituted
21 new matter was we believe overlooked by the examiner, and we
22 would posit, Your Honor, that it was due to --

23 THE COURT: Was there any affirmative
24 misrepresentation by Sonos in any of those amendments?

25 MR. LORDGOOEI: Our position is is that there was,

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1 because they told the examiner this does not constitute new
2 matter. They expressly told the examiner that as part of
3 their amendment.

4 THE COURT: Well, read to me what they said.

5 MR. LORDGOOEI: So if we could pull up TX-4,
6 Mr. Wilson. And I may need to find it, Your Honor. I have,
7 at page 808, Mr. Wilson --

8 THE COURT: Is the pros -- is the record, the entire
9 record, for the '885 and '966 --

10 MR. LORDGOOEI: That's the prosecution --

11 THE COURT: Is that in our trial record?

12 MR. LORDGOOEI: It is, Your Honor.

13 THE COURT: What exhibit number is it?

14 MR. LORDGOOEI: TX-4 I believe is for the '885
15 patent and TX-6 is the file history for the '966 patent. And
16 on this issue, I believe they are substantially similar, if
17 not identical.

18 MS. MOULTON: Your Honor, just quickly, these are
19 excerpts of the file history that the parties agreed on,
20 they're not the complete file history.

21 THE COURT: Well ...

22 MR. LORDGOOEI: I believe, Your Honor, and Sonos'
23 counsel can correct me if I'm wrong, but in terms of it not
24 being the complete file history, for example, we didn't
25 include the full 70,000 pages of prior art references that are

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1 part of the file history, but all of the back and forth with
2 the examiner is included as part of the file history.

3 THE COURT: Well, is the 70,000, is that in the
4 trial record, or is that just you talking?

5 MR. LORDGOOEI: Um, one of the -- yes.

6 MR. PAK: Dr. Schonfeld testified to that effect.

7 The entire record itself is not in --

8 THE COURT: But did he say that there were 72,000?
9 Think so?

10 MR. PAK: I will check the (inaudible).

11 THE COURT: All right. Okay. What -- finish up
12 your argument on latches.

13 MR. LORDGOOEI: So in effect, Your Honor, the point
14 is that this was the perfect storm that Sonos created for the
15 examiner about filing these patents as Track 1 expedited
16 patents. All of a sudden, even though throughout the
17 prosecution of the parent applications, they at most disclosed
18 a hundred references to the examiner to review, all of a
19 sudden they dump 1800 references, and throughout all of this
20 process they amend their specification and represent to the
21 examiner that the amendment does not introduce new matter,
22 even though it clearly introduced new matter, because they
23 were taking a portion of the provisional specification that
24 relates to zone grouping and not zone scenes, and they were
25 representing to the examiner and representing to us throughout

1 this case up until trial, when we went through the written
2 description issues, and representing to Your Honor throughout
3 this case and up to trial that this is talking about zone
4 scenes, it doesn't add new matter, and this was all in our
5 prior filings, and nothing has changed, all the specifications
6 are the same, and that's simply not true. This was added as
7 new matter in August 2019. It's an abuse of the PTO
8 procedures that allow amendments of the claims.

9 And as we've pointed out in prior briefing, Your
10 Honor, the fact that they added new matter turns this
11 application effectively into a continuation in part, which the
12 Federal Circuit has held invalidates the patents. And so it's
13 invalid for that reason alone, because they're adding new
14 matter to an application filed as a continuation, but was not
15 filed as a continuation in part.

16 But even setting that aside, it's clearly an attempt
17 to mislead the examiner into granting the patent 13 years
18 after they filed their original provisional application, years
19 after Google met with -- and my colleague, Ms. Robins, can
20 talk about this in the context of equitable estoppel -- but
21 years after they met with Google over similar technology after
22 Google disclosed it's product plans for --

23 THE COURT: Is that document in the trial record
24 about the disclosing overlapping? Is that in the trial
25 record?

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1 MR. LORDGOOEI: Yes, Your Honor.

2 THE COURT: That was in 2013.

3 MR. LORDGOOEI: So this goes to, if you recall, the
4 deposition testimony from Tomer Shekel --

5 THE COURT: Well, depositions don't count. It has
6 to be in the trial record.

7 MR. LORDGOOEI: It was played, Your Honor.

8 THE COURT: All right.

9 MR. LORDGOOEI: So the deposition testimony was
10 played for the jury. The exhibit is in evidence as TX-125.

11 And maybe we could, Mr. Wilson, pull up Slide 7.

12 And so this is part of the presentation that Google
13 and Mr. Shekel presented to Sonos in the 2014 timeframe. This
14 is in the trial record, TX125 at page 18, where we're showing
15 to them our product -- confidential product plans for
16 implementing this Cast for Audio technology in which we're
17 presenting overlapping speaker groups. You can see there
18 speaker C is part of an overlapping speaker group.

19 On the next slide, Slide 8, TX-125 at page 24, we're
20 disclosing functional operation and functional details of what
21 this speaker grouping feature would look like, where, for
22 example, if a user is playing music on speaker A and then
23 another user decides to play music as a group, decides to
24 invoke the group, well, what happens? Speaker A transitions
25 from playing individually to playing as a group.

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1 And so this all, you know, it's not a perfect fit
2 over the asserted claims, so the asserted claims we still
3 believe do not read on Google's technology, but they at least
4 saw the functional details, that Google was willing to
5 implement overlapping speaker groups, they were going to do it
6 in a particular way. They said nothing at any point about
7 owning the IP or having patents on this technology.

8 Lo and behold, five years later, after, as Your
9 Honor recalls, the parties engaged in licensing discussions
10 that fell through, five years later they go back, they decide
11 to file '885, '966, expedited with claims directed to
12 overlapping speaker groups, and the only way they got there
13 was by amending their specification to introduce new matter.
14 And this is after Google has already released millions of
15 speaker products. Which, by the way, Your Honor, the second
16 element of prosecution laches, the prejudice, including
17 through intervening rights of Google, we released millions of
18 speaker products which now, in other posttrial briefing, for
19 the first time Sonos is alleging, well, you implemented a new
20 firmware software that you pushed to those old speakers that
21 were all sold before the damages period started for these
22 patents. Now, all of those speakers are infringing, and so we
23 want supplemental damage for those speakers, as well.

24 And so this is -- these are the types of intervening
25 rights and prejudice, including all the investments that

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1 Google made in releasing this product line and developing this
2 technology that all go to that second factor of prejudice.

3 THE COURT: All right. Let's hear from the other
4 side.

5 THE COURTROOM DEPUTY: Please identify yourself.

6 MR. PAK: Yes, this is Sean Pak.

7 Just to follow up on His Honor's question, the
8 testimony at trial about the 70,000-plus pages of prosecution
9 history is at 1430, line 24, to 1431, line 4.

10 Thank you, Your Honor.

11 THE COURT: All right. Thank you.

12 Okay. Let's hear from Sonos.

13 MS. MOULTON: Your Honor, I'm Elizabeth Moulton for
14 Sonos.

15 So what I heard was an argument about why the
16 patents may lack written description or have a different
17 priority date, but I did not hear an argument about
18 prosecution laches. This amendment to the specification,
19 they're saying that that was somehow an abuse of the patent
20 system. When Sonos submitted the amendment, Sonos told the
21 examiner, here's our amendment, here's where you can find the
22 amendment in the provisional application, and the examiner
23 accepted that amendment, which is a decision entitled to an
24 especially weighty presumption of correctness, which we've
25 explained in all the prior briefing on priority and written

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1 description.

2 I think that's, first of all, completely unconnected
3 with the number of references submitted to the examiner. As
4 we explained in our briefing, the number of -- the information
5 submitted on the information disclosure statement, or the IDS
6 in the prosecution history, that includes a number of
7 litigation filings that are not prior art. So they're not
8 references the examiner has to look through to determine
9 novelty or nonobviousness. But regardless, this sentence that
10 Google says is a new matter, that's not the only support for
11 overlapping zone scenes in the specification, which we've
12 explained to you in all of the briefing on the written
13 description issue.

14 So I just, I don't see where there was any abuse of
15 the patent system. This argument boils down to the new matter
16 and written description question that has already been --

17 THE COURT: Well, not quite.

18 Here's the way I understand the argument. It does
19 double duty. It goes to written description, but it also goes
20 to the, what was going on in the time period between 2006 and
21 2018. And at a critical moment in time in 2013, they say
22 you -- no, Google disclosed to Sonos its plan for speakers,
23 and then it was only then that you decided that you would try
24 to get a patent that would cover that. And the -- and so they
25 are saying some misrepresentations or incomplete disclosures

1 were made to a busy examiner to slip that one sentence by the
2 examiner. Which, it was important. I did not know about the
3 history of that sentence when I did the written description
4 order, but I -- it was important, and I called it out as the
5 sentence that saved the day for written description.

6 And then I come to find out that never existed in
7 the original 2006.

8 MS. MOULTON: I disagree.

9 THE COURT: That was allegedly, and I say that in
10 quotes, allegedly in the Appendix A. I didn't know that.

11 Now, Google and their armada of lawyers failed to
12 bring that to my attention, and I -- I am -- whether or not
13 they can go back and revisit written description is a
14 completely separate issue from whether or not they can go back
15 and look at prosecution laches. And prosecution laches is on
16 the table, because all of the affirmative defenses were
17 preserved. And so that is -- that's why I'm focusing on this.
18 And they say that if there were slick dealings with the PTO,
19 that I can take that into account. "Abuse" I guess is the
20 word, that if there was an abuse.

21 Now, maybe there was abuse. If you truncated that
22 diagram and said it was in Appendix A but it wasn't in
23 Appendix A, wouldn't that be a fraud on the examiner? And
24 just because the examiner could go and check, we all know they
25 don't have time to do that. So wouldn't that be a fraud on

1 the examiner?

2 MS. MOULTON: It would not, Your Honor.

3 The way the prosecution works, as I think you're
4 pretty familiar with, we submit a response to the office
5 action that lays out exactly our arguments and the changes we
6 want to make to the claims or the specification. That's the
7 entire focus of the prosecution.

8 THE COURT: Yeah, but then there could never be a
9 fraud on the examiner because the examiner can check it all
10 out, according to you. You could say anything you wanted, and
11 as long as the examiner could show it's false, then there's no
12 fraud. But that -- but that undermines the whole idea of
13 fraud on the examiner, and the Supreme Court itself has said
14 if you commit fraud on the examiner your patent's no good.

15 MS. MOULTON: So to step back a little bit --

16 THE COURT: Inequitable conduct, that's what it's
17 called.

18 MS. MOULTON: Yeah, exactly. Fraud on the examiner
19 would go to inequitable conduct, which they have not pled.

20 Well, I'm not sure they didn't -- they did or they
21 didn't.

22 THE COURT: Yeah, but they did say abuse, and that
23 fits under the prosecution laches.

24 MS. MOULTON: But prosecution laches is for
25 unreasonable and unexplained delays in prosecution. That's --

1 those are the circumstances.

2 THE COURT: What is your excuse for the delay?

3 MS. MOULTON: I don't think there was any delay.

4 We --

5 THE COURT: 2006 to 2019?

6 MS. MOULTON: And in that period --

7 THE COURT: In a fast moving industry, where
8 everything goes at lightning speed? That's 13 years.

9 MS. MOULTON: And in that period, Your Honor, Sonos
10 diligently pursued all of the intervening applications. We
11 never filed applications and abandoned them in this
12 prosecution chain, which is the circumstances in which you're
13 abusing the patent office by continuing prosecution of your
14 application --

15 THE COURT: That is one species, but not the only.
16 I agree it's not the submarine model. I -- but it's the --
17 it's a different model. It's a different model, where you
18 maybe have set back, let the industry develop and finally
19 decided, oh, the industry has developed to the point, now
20 maybe we can find a way to tell the examiner that we invented
21 overlapping. Oh, here the ticket. We'll truncate the
22 diagram. That's a busy examiner. He's got 72 pages to read,
23 72,000. I can just imagine how that conversation came down in
24 the law firm.

25 MS. MOULTON: Google has the burden of proving this.

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1 They have no evidence about -- of any of that speculation
2 about what happened in terms of --

3 THE COURT: You know what happened in the history.
4 That is not speculation.

5 MS. MOULTON: And what happened in the history is
6 Sonos told the examiner this is the amendment we want to make,
7 this is our support for the amendment, we think it's not new
8 matter. You make the decision as the examiner, a decision
9 that is entitled to an especially weighty presumption of
10 correctness, and the examiner --

11 THE COURT: It would be one thing if you had said --
12 Somebody is trying to bug you. What do you want,
13 counsel?

14 MR. SHEA: Sorry, Your Honor. I just want to
15 clarify --

16 THE COURT: What is it that you want? She's doing a
17 good job. What is your point?

18 MR. SHEA: I absolutely agree. I just want to
19 correct one things.

20 THE COURTROOM DEPUTY: Identify yourself, Counsel.

21 MR. SHEA: Rory Shea on behalf of Sonos.

22 The diagram was not truncated in 2019. The diagram
23 had been in the specification since 2007, Your Honor. I just
24 wanted to clarify that one thing.

25 MR. LORDGOOEI: The truncated diagram was in the

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1 specification, Your Honor, not the full diagram.

2 MR. SHEA: But again, to the extent there is any
3 so-called truncation, that happened in 2007, Your Honor. The
4 only amendment that took place in 2019 was a single sentence
5 added to the specification. That's all I wanted --

6 THE COURT: So that's a fair point. Thank you for
7 that clarification.

8 What do you say to the fact that the diagram was in
9 there from 2007?

10 MR. LORDGOOEI: That's fine. They can say in 2007,
11 as part of their original filed application, that that
12 truncated figure in the patent specification is a form of
13 adding a zone scene, a zone scene. That's the only thing that
14 was said in that 2007 specification. They can use it to form
15 a zone scene.

16 The issue is that in 2019, 13 years later, they file
17 an amendment that adds a sentence that now supports,
18 supposedly and purportedly supports multiple overlapping zone
19 scenes, and they pull that sentence from a portion of the
20 provisional application. The sentence was not in the 2005 --
21 2007 specification, it was in the 2006 provisional. They pull
22 it from a portion of the provisional that was never talking
23 about zone scenes. And in fact, as Your Honor saw, it was
24 saying do not use this interface for zone scenes.

25 So that's the primary issue, Your Honor.

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1 The other issue is in terms of the delay, I didn't
2 hear any excuse for why they would delay 13 years to disclose
3 the concept of overlapping zone scenes in their specification.
4 Again, we disagree that it was disclosed earlier. We don't
5 believe it was. We believe any disclosure, if at all, came
6 through this 2019 amendment, and therefore there's --

7 THE COURT: I thought there was some art in one of
8 the co-pending applications, not '885, not '9, but a
9 co-pending, where the examiner specifically said that it did
10 not support overlap. Am I wrong about that?

11 MR. LORDGOOEI: I would have to look into that, Your
12 Honor. Maybe Mr. Shea ...

13 THE COURT: Yes?

14 MR. SHEA: Mr. Shea again for Sonos.

15 Yes. So, Your Honor, there was no point that I'm
16 aware of where the examiner ever questioned whether there was
17 support for overlapping zone scenes. I think what Your Honor
18 may be thinking of is, so just to clarify, you've asked a
19 couple questions. I think I have some answers for you.

20 So there were four patents applications total where
21 this amendment was made, all at around the same time, and
22 maybe you have some of the specific in your mind that --

23 THE COURT: Yeah, August 6th. You told me -- my law
24 clerk says August 6, 2020, '532 application rejected.

25 MR. SHEA: Yeah.

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1 THE COURT: McCord finds provisional does not
2 support '532 overlap.

3 MR. SHEA: So Your Honor, I have -- that was where I
4 have right in front of me. So Your Honor, my notes on this
5 are that he -- the new matter issue -- what was the date you
6 had, Your Honor?

7 THE COURT: August 6, 2020. McCord finds
8 provisional does not support '532 overlap.

9 MR. SHEA: So Your Honor, the note I have here is
10 that the issue there was not about overlapping zone scenes,
11 but it was about a different limitation directed to selectable
12 indications of two or more zone scenes to be simultaneously
13 displayed, where, yeah, the two or more zone scenes are to be
14 invoked.

15 So two things on this, Your Honor. Yes, so we're
16 talking about the same thing. I just wanted to make sure I
17 had the date right. I didn't want to misstate. So yes, I
18 have that quoted here. So that is true, Examiner McCord
19 raised a question about support back to the 2020 provisional
20 with respect to this limitation directed to selectable
21 indications being simultaneously displayed.

22 And in response to that, then Sonos responded to
23 that and told the examiner to please look at the 2006
24 provisional, and specifically at, on the figure on page 5 of
25 the Appendix A, which shows two zone scenes being displayed,

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1 one called morning and one called party mode. And then at
2 that time Sonos also stated in its response, it reminded the
3 examiner it had been previously added to the application in
4 accordance with 156(g), and the examiner then agreed. And the
5 quote I have here says that: "The examiner found that the
6 remarks filed are accepted by the examiner and suffice to
7 establish support for the claim subject matter in a prior
8 filed parent case, the provisional application, and afford the
9 instant application an effective priority date of
10 September 12th, 2006."

11 And that was in the Notice of Allowance that was
12 mailed in that '532 case on February 3rd of 2021.

13 THE COURT: All right. This could be important to
14 me, so what was the date of that material, what you're reading
15 from.

16 MR. SHEA: Yes. So again, I was -- so, Your Honor,
17 the --

18 THE COURT: Well, what were you reading from? Is
19 that just you talking, or was that the examiner talking?

20 MR. SHEA: These are quotes -- that was a quote from
21 the examiner.

22 THE COURT: Okay. What was the date of that quote?

23 MR. SHEA: February 3rd, 2021, Your Honor.

24 THE COURT: All right. February 3rd.

25 Now, in the meantime, had that amendment been made

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1 for -- and had that amendment been relied top satisfy McCort?

2 MR. SHEA: The amendment, the same amendment that
3 was made to the two cases here --

4 THE COURT: Yeah.

5 MR. SHEA: -- was similarly made in that case,
6 That's correct, Your Honor.

7 THE COURT: Was that cited to McCord?

8 MR. SHEA: Yeah, Your Honor. I believe the same
9 exact language was cited in all, all four cases.

10 THE COURT: All right. So that sentence was cited
11 to McCord to overcome his problem about, quote, simultaneously
12 displayed.

13 MR. SHEA: So Your Honor, because, again, I just
14 don't want to misstate the facts. In that case, because
15 "simultaneously displayed" was a slightly different
16 limitation, it was about displaying, the focus that -- of
17 Sonos' response to the Examiner McCord in that particular
18 application was not on the sentence we're all talking about,
19 it was actually about the figure on page 5 of the appendix of
20 the provisional.

21 THE COURT: Why, what is that figure?

22 MR. SHEA: It's -- yeah, I can show you, Your Honor,
23 actually.

24 MR. LORDGOOEI: Your Honor, I just want to point out
25 that all this shows is that what the examiner noted and what

1 Sonos represented to the examiner in this other application
2 had nothing to do with overlapping zone scenes.

3 MR. SHEA: Your Honor, in fact, I mean, I'm going
4 to -- yes, sorry. I'm trying to do too many things at once,
5 Your Honor.

6 Slide 12.

7 THE COURT: No, I am -- all right. No one seems to
8 want to answer my question.

9 When, in the '532, was that sentence about the
10 overlap? When was that -- when was that added?

11 MR. SHEA: Yeah, sure, Your Honor. That was added
12 in November of 2019 to the '532.

13 THE COURT: November 2019.

14 Okay. Now, was that amendment ever advanced to try
15 to satisfy McCord on his problem that he raised on August 6,
16 2020?

17 MR. SHEA: So again, Your Honor, so --

18 THE COURT: When you start with the word "so," I
19 know you're going to slide off.

20 MR. SHEA: I just, I don't want to say -- so when
21 the amendment was made there were multiple things added, and
22 one of those things was cited to Examiner McCord.

23 So, yes, some of that --

24 THE COURT: Was that one sentence that we're all
25 concerned with cited?

1 MR. SHEA: No, that was not discussed with Examiner
2 McCord in that case because that case had different claim
3 language, Your Honor.

4 THE COURT: All right. Okay. Now, go into
5 August 6, 2020. What I'm reading here says: "McCord finds
6 provisional does not support '532 overlap," but you're telling
7 me that he wasn't even talking about overlap, is that ...

8 MR. SHEA: That's -- I'll double-check it, Your
9 Honor, but my notes that I have is that the limitation at
10 issue was about simultaneous display of indications, and it
11 wasn't -- there was no express requirement in the claim that
12 the zone scenes at issue there were overlapping or not. I
13 think it could have been either way.

14 So I'm not going to represent to you that that was
15 --

16 THE COURT: The phrase "simultaneously displayed,"
17 does that mean or include the concept of overlap?

18 MR. SHEA: It certainly covers it, but I think it's
19 not limited to it, Your Honor.

20 MR. LORDGOOEI: Your Honor, if I'm recalling
21 correctly now, I think this came up during some of the
22 briefing that we submitted on the written description issue.
23 So for example, our brief at Docket 739 on page 6 talks about
24 this '532 patent, and I believe at that time at trial, counsel
25 was relying on the examiner affirmatively blessing that

1 amendment in the '532 application as supporting what counsel
2 has said is an especially high weight or high presumption
3 given to the examiner's acceptance.

4 And so in our filing at Docket 739, at page 5 to 6,
5 we explain that the '532 patent had nothing to do with
6 overlapping zone scenes, and in fact what the limitation was
7 that was at issue there I believe was, quote, "the recited
8 display of a selectable indication of a zone scene upon which
9 selection invokes the zone scene onto the plurality of
10 playback devices," not multiple zone scenes, not multiple
11 overlapping zone scenes, which was at issue in the '885 and
12 the '966.

13 MR. SHEA: Your Honor, I have the amendment pulled
14 up right here in front of me, and I can just read it to you if
15 you'd like, or however.

16 THE COURT: Okay. Which amendment?

17 MR. SHEA: Sorry. Yes, so I shouldn't say
18 amendment. I have the examiner's statement as to what
19 limitation of the '532 he was questioning the support for.

20 THE COURT: On August 6, 2020.

21 MR. SHEA: That's correct, Your Honor.

22 THE COURT: All right. Please read it.

23 MR. SHEA: Sure. So he said: "The claimed causing
24 of selectable indications of two or more zone scenes to be
25 simultaneously displayed, wherein the displayed selectable

1 indications are each selectable to cause a respective one of
2 the two or more zone scenes to be invoked by the first zone
3 player is not supported in the prior filed applications and is
4 afforded the filing date of the instant application,
5 April 12th, 2019, as the priority date."

6 So Your Honor, what we see there is, yes, so the
7 phrase "overlap" doesn't appear, but it certainly is talking
8 about multiple zone scenes that are being simultaneously
9 displayed. And for completeness, the word "simultaneously" is
10 underlined in the examiner's rejection or objection here, as
11 well as the word "zone player" also underlined.

12 And so that was the August 6, 2020, off section,
13 Your Honor, certainly talking about displaying indications
14 about multiple zone scenes. And then Sonos responded to that
15 and pointed out the prior amendment to the specification,
16 which included multiple things, one of which was the sentence
17 we've been discussing, as well as a figure from a different
18 page. And the examiner, then, in his February 3rd, 2020,
19 Notice of Allowance then withdrew this, this objection, and
20 agreed with Sonos that the amendment that they had made
21 resolved that issue and entitled Sonos to the September 12th,
22 2006, priority date.

23 THE COURT: All right. Okay. Hold that thought.

24 Let me ask Google. What is the clearest, in your
25 view, instance of the abuse of the PTO procedures in acquiring

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1 the '885 patent?

2 MR. LORDGOOEI: So in our view, Your Honor, it would
3 be delaying 13 years before submitting an amendment to the
4 specification in which they added the one sentence that
5 everyone keeps going back to for written description support
6 of overlapping zone scenes and representing to the examiner
7 that that did not add new matter. So that period of delay
8 supports prosecution laches, but the abuse of the process, the
9 clearest abuse of the process, PTO rules and procedures is
10 amending the specification to add a portion of the provisional
11 that has nothing to do with zone scenes and representing to
12 the examiner that it supports overlapping zone scenes, and
13 representing to this Court and to Google and to others and to
14 the public that it supports overlapping zone scenes, when in
15 fact, we believe, and we've briefed this, that it's new
16 matter.

17 THE COURT: Well, the -- assume for the moment --
18 but you, yourself, admit that the diagram that was cut in half
19 was in the 2006 to begin with, right? So, see, that can't be
20 new matter. It may be that it was -- it was -- its origin was
21 different, but at least it was in the original 2006.

22 So what was it about that one sentence that was
23 misrepresented?

24 MR. LORDGOOEI: Well, that's right, Your Honor.

25 Half of the diagram was part of the original 2007 application

1 that was filed that led to the '853 patent. The full diagram
2 was in the provisional, but the issue is that the full diagram
3 and that one sentence was in the provisional, in a portion of
4 the provisional that was talking about the graphical user
5 interface on the handheld controller for setting up zone
6 groups, which Sonos and its inventor have vehemently argued
7 throughout the trial is not a zone scene. They've
8 distinguished zone groups and zone scenes and --

9 THE COURT: You're not answering my question.

10 All right. Read to me what the one sentence that
11 was added in 2019 said. Just that would be useful. I don't
12 have it in mind.

13 MR. LORDGOOEI: Sure.

14 If we can put up, Mr. Wilson, we had that up on
15 Slide 17 of Google's presentation.

16 And so I'll read it, Your Honor. The one sentence
17 is that: "The list of zones in the screen above includes
18 ALL," capitalized A-L-L, "the zones in the system, including
19 the zones that are already grouped.

20 THE COURT: So that -- that doesn't ring true to me.
21 That -- is that the sentence that was in the written
22 description argument?

23 MR. LORDGOOEI: I believe that's the --

24 THE COURT: Show me the -- give me the patent,
25 please, and then let me read it in the actual specification.

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1 MR. SHEA: Your Honor, I have it on a slide
2 annotated as the amendment, if that would be helpful.

3 THE COURT: I'd just like to see it in the
4 specification, the thing that I relied on on my written
5 description.

6 MR. LORDGOOEI: We can put up the patents.

7 And I believe, Mr. Wilson, it's the '885. If you
8 can go to Column 10 of the patents, and zoom in on the portion
9 (inaudible) ...

10 THE COURT: Too small.

11 MR. LORDGOOEI: It's that paragraph, sorry.

12 If you could highlight, Mr. Wilson, the sentence
13 that starts: "The list of zones in the user interface 520
14 include ALL the zones in the system, including the zones that
15 are already grouped." That was what was added, Your Honor.

16 Your Honor, you know --

17 THE COURT: Okay. Where -- is that exact sentence
18 somewhere in the Appendix A?

19 MR. LORDGOOEI: It is, Your Honor.

20 And so if we could put, either side by side or below
21 this, Mr. Wilson, the portion of Slide 17 that has the
22 language.

23 So Your Honor, it's not exactly the same sentence,
24 because in -- when it was added to the specification, the
25 reference was added "in the user interface 520." And user

1 interface 520 was part of the Figure 5B that was in the
2 patents. And so the differences are, you know, instead of "in
3 the screen above" which is referred to in the provisional, the
4 patent says "in the user interface 520."

5 And the key issue, Your Honor, is that in the
6 patents, they're representing that this sentence is talking
7 about a screen in which the user is setting up zone scenes.
8 In the provisional, they represented to the world that this is
9 a screen associated with setting up and configuring zone
10 groups. Which, that same provisional indicates that this
11 screen in the provisional in which they've indicated that the
12 list of zones in the screen above, so the screen above that's
13 referred to in the provisional is the screen that the
14 provisional says is not expected should be used to set up zone
15 scenes.

16 And so they've taken language that applies to zone
17 groups and a screen and the handheld controller that is used
18 to set up zone groups, not zone scenes, they've taken that
19 sentence, they've put it in the specification.

20 THE COURT: Which one of these -- is that the top
21 half over the bottom half that became 5B?

22 MR. SHEA: It would be the bottom half, Your Honor.

23 MR. LORDGOOEI: Of the figures, the 5B.

24 THE COURT: And what is 520, then? User interface
25 520.

1 MR. LORDGOOEI: Mr. Wilson, maybe we could put up
2 Figure 5B from the patents. I believe it's just the screen,
3 but we can confirm.

4 MR. SHEA: It's just referring to the entirety of
5 the screen, Your Honor, is my understanding.

6 THE COURT: All right. I should have had the
7 patent, but I don't.

8 Can somebody show what 520 is referring to?

9 MR. LORDGOOEI: We're putting that up on the screen
10 now, Your Honor. This is Figure 5B from the patents, and 520
11 just refers to the entirety of the patent.

12 THE COURT: All right. So 520 is 5B.

13 MR. SHEA: That's correct.

14 THE COURT: All right. Can you put up on the screen
15 the exact explanation that was given to the examiner in the
16 amendment as to where that sentence came from? Is that
17 available?

18 MR. LORDGOOEI: I believe it's at TX-4, Mr. Wilson,
19 and if you could go to page 808.

20 So this is the portion of the prosecution history
21 showing the redlines to the specification adding the sentence,
22 and if we could keep flipping through that file history, we'll
23 get to the portion of the office action that has the
24 explanation.

25 Do you have the page number?

1 MR. SHEA: Twenty-one.

2 MR. LORDGOOEI: So 821, Mr. Wilson. There's a
3 numbered paragraph 3, Amendment to the Specification.

4 THE COURT: Well, this -- you're putting so much so
5 quickly, I can't read any of it. Just leave what's up there
6 there for a minute.

7 What am I looking at now?

8 MR. LORDGOOEI: Your Honor, this is the explanation
9 that was given to the patent examiner for the amendment that
10 was made to the specification adding the sentence that we've
11 been looking at.

12 So you can see here, Your Honor, they represented
13 that: "Applicant inserts material into the specification and
14 figures that was previously incorporated by reference in this
15 application, and the amendment contains no new matter." So,
16 we represent to the examiner that it contains no new matter
17 because it was previously incorporated by reference, according
18 to them.

19 THE COURT: Well, is this -- is this the --
20 everything that was submitted to the examiner on this point?

21 MR. LORDGOOEI: I believe so. On this point this is
22 what was submitted, this paragraph. I didn't read the full
23 paragraph.

24 THE COURT: Well, show me -- you put something up
25 there a minute ago that seemed to be more material. It

1 actually had the language.

2 MR. LORDGOOEI: Right.

3 THE COURT: Go to that.

4 MR. LORDGOOEI: What we saw earlier, Your Honor, so
5 typically with these office action responses you'll have
6 amendments.

7 THE COURT: There, there.

8 MR. LORDGOOEI: This is the actual amendment.

9 THE COURT: Just leave it up there. Leave it there.

10 Can you go back? Your expert there cut off some of
11 it. Let me see the full paragraph. I can read it. Just stop
12 there.

13 MR. LORDGOOEI: Your Honor, this is the portion of
14 the office action response that instructs the examiner what
15 the amendments are, and then later they provide the
16 explanation of the amendment.

17 THE COURT: All right. Now, is this the entirety of
18 what was submitted to the examiner, or is there more on this
19 one sentence?

20 MR. LORDGOOEI: On this one sentence, I believe this
21 is it.

22 THE COURT: All right. What did the examiner --
23 what's his response?

24 MR. LORDGOOEI: I believe the examiner just accepted
25 the amendment, made the change.

1 THE COURT: What exhibit is this found in, this
2 document on the screen?

3 MR. LORDGOOEI: TX-0004.

4 THE COURT: All right. Now, show me what the
5 examiner said.

6 MR. LORDGOOEI: Mr. Shea has the citation for the
7 examiner's response.

8 THE COURT: Can you read it out loud if you can't
9 show it to me?

10 THE COURTROOM DEPUTY: Counsel, please get closer to
11 the microphone.

12 MR. SHEA: I'm trying to look at to save time.
13 Sorry about that. Your Honor, so I'm going to try to find it
14 for you.

15 He didn't say anything express about the amendment.
16 So the way the process typically works is that when an
17 examiner allows an application e-mail, something called the
18 Notice of Allowance. And in that Notice of Allowance, there
19 is often not commentary on all the issues and arguments
20 raised. And this is the circumstance where he mailed the
21 Notice of Allowance, and in that Notice of Allowance he did
22 not expressly weigh in on the amendments made to either the
23 claims or the specification, other than to say that he had
24 accepted it and allowed the application.

25 THE COURT: Well, that's what I'd like to see.

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1 MR. SHEA: Okay.

2 THE COURT: So let me see that language.

3 MR. SHEA: Okay. So, yeah, I think I have ...

4 Yeah, so if we could go to TX-4, starting at
5 page 19.

6 So Your Honor, this is the first page of it, which I
7 was referring to as the Notice of Allowance. You can see
8 largely the first page of this is just a template form; it's
9 administrative. It gets a little bit more substantive at, let
10 me ... at page 23 of TX-4. So if we could at least look at
11 the top half of that.

12 And so you can see, Your Honor, in bullet 1 there,
13 he says that: "This communication's responsive to the claims
14 filed 8/23/19," and then there was also an interview
15 8/30/2019. The bullet where he allows everything is in -- or
16 the claims is bullet 3, and he says: "The allowed claims are
17 1 through 20."

18 THE COURT: Well, I thought you said there was
19 someplace where he specifically allowed the amendment to that,
20 to allow the one sentence.

21 MR. SHEA: Sorry, no, Your Honor.

22 What I was trying to say is there wasn't anything
23 express on that. So he just, he accepted it by virtue of
24 not -- of mailing this Notice of Allowance and not reraising
25 that objection.

1 THE COURT: Well, who -- who printed the
2 specification? Is it the patent office?

3 MR. SHEA: Yeah, that's right, Your Honor.

4 So then what happens is after -- the process is that
5 once the examiner allows it, like he did here, then there is
6 some additional back and forth with the examiner, you pay a
7 fee, and then somebody at the patent office then takes all the
8 amendments that have been made and finalizes them and prints
9 the official granted patent, which is the --

10 THE COURT: Well, let's see. So I'm just trying to
11 make sure that the patent examiner in fact did accept it.

12 So you're saying that it was not Sonos, but it
13 was -- who did the printing. It was somebody in the patent
14 office found the amendment, inserted it in its right place and
15 then printed it as the official document?

16 MR. SHEA: That's right, Your Honor.

17 They take -- we saw that paragraph a few moments ago
18 where it was underlined in that paragraph. That's how patent
19 attorneys submit amendments to the patent office. We show
20 them what we're adding with underlying, and then the patent
21 office takes that underlying and then puts it in the right
22 place when they print the patent, and that's what happened in
23 this case.

24 THE COURT: Did Sonos have any role in helping the
25 staff find the amendments?

1 MR. SHEA: Other than the submissions we've seen,
2 Your Honor, where they underline the sentence in the standard
3 form that we do with the patent office, that is how we tell
4 the patent office here's what needs to be added or sometimes
5 deleted. You mark it up, that's the procedure, and then they
6 use that markup to implement the changes.

7 THE COURT: Here's what I'm trying to get at. I
8 just want to make sure there's no shenanigans. Was there any
9 point in which Sonos submits to the PTO staff, hey, here's how
10 we think the specification should read, and remember there was
11 this amendment, so here it is. Did that happen, or was all
12 the homework done by somebody at the PTO with respect to
13 inserting that one sentence?

14 MR. SHEA: That's right, Your Honor. After --

15 THE COURT: What's right?

16 MR. SHEA: Yeah, your character -- sorry. There was
17 no assistance by Sonos with the patent office.

18 THE COURT: All right. Is that correct?

19 MR. LORDGOOEI: So the --

20 THE COURT: When you start with "so," I know you're
21 going to slide off.

22 MR. LORDGOOEI: No, it's correct.

23 There are certain instances where the patent office
24 may inadvertently introduce a typo or an error, and there are
25 procedures where the patentee can then ask for a correction.

1 But in this case they submitted their amendment, and the
2 examiner implemented it into the specification.

3 THE COURT: All right. So what is the most direct
4 proof that the examiner even saw this amendment, other than a
5 presumption?

6 MR. SHEA: So, well, Your Honor --

7 THE COURT: So ...

8 MR. SHEA: I got to get out of that habit. For me
9 it's --

10 THE COURT: It just is a dead -- it always to me
11 suggests that you don't want to answer my question, so you're
12 going to answer some other question that sounds like it.

13 MR. SHEA: Yeah, I'm sorry. For me, I think it is
14 actually me trying to formulate the most accurate answer I
15 can.

16 THE COURT: Well, I want to know is it -- to me,
17 there's absolutely nothing in this record that shows the
18 examiner looked at that sentence, but, and that the staff just
19 stuck it in there. But maybe I'm wrong. Maybe there's
20 someplace where the exam -- there's a -- the examiner looked
21 at it.

22 PLAINTIFF'S ATTORNEY: Yeah. So I think the
23 closest, Your Honor, was if we go back to that page we were
24 looking at, the Notice of Allowance.

25 THE COURT: Okay.

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1 MR. SHEA: Let me get that.

2 So it's page 23 of TX-40. And it says that that
3 communication is responsive to, and it says: "The claims
4 filed 8/23/2019." And I realize it says the word "claims"
5 there, Your Honor, but the 8/23/2019 date, that's that full
6 submission that Sonos made that included amendments to both
7 the claims and the specification. So by saying here that the
8 examiner is issuing this Notice of Allowability responsive to
9 that filing on August 23rd, 2019, that that indicates that he
10 did indeed read, review and acknowledge what was in that
11 response.

12 And just for your context, Your Honor, I should have
13 looked it up in the event you were going to maybe ask about
14 it, but that whole submission, the 8/23/2019 submission, is
15 about 20 pages double spaced. So it's not like it's a
16 voluminous paper. It's, the whole thing was that lengths.

17 That's just -- that is just patent office protocol.
18 You submit these responses. They tend to be around 10 to 20
19 pages long, as a person who does this. And you mark your
20 amendments, you give your explanations for why you're making
21 those amendments and why you think you're entitled to a
22 patent. The examiner then reviews that and then issues either
23 a new rejection or a Notice of Allowance. And in this case
24 the examiner responsive to that submission issued a Notice of
25 Allowance.

1 And I think it's important to remember, Your Honor,
2 as well, that all of this was happening while the examiner --
3 the examiner hadn't even questioned whether there was written
4 description support for overlapping groups. And that's not
5 surprising to me, because as we've laid out on various other
6 briefs, there's a lot of other support for overlapping groups
7 in this specification, including another sentence that is
8 almost verbatim to the one that got added in a different part
9 in the specification.

10 So the examiner wasn't questioning whether there was
11 problems with overlapping group support in this specification
12 at all. So it's not like he had to withdraw a rejection on
13 written description 112's support for overlapping groups.
14 There was one -- there wasn't one.

15 MR. LORDGOOEI: Your Honor, I would just point to
16 Mr. Pak's earlier comments that that's no substitute for
17 judicial review. The examiners get things wrong all the time.
18 And in fact, if you look at the Notice of Allowability in this
19 case, which I believe Mr. Shea was referring to, there's
20 reference to the application being amended as follows, and
21 there are a series of -- unless I'm missing it, I'm not
22 seeing -- I'm seeing amendments to the claims that were made,
23 but I don't see the examiner actually ever discussing the
24 amendment to the specification, let alone --

25 THE COURT: Where do you see reference to amendment

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1 to the claims?

2 MR. LORDGOOEI: So this would be the Notice of
3 Allowability. If we could go to TX4, at page 23. I believe
4 that's the front page of it, but if we go to page 24, the
5 following page, there's an examiner's amendment that was made
6 based on, I guess they had an interview with Brandon Kennedy,
7 who's at counsel's firm, on August 30th. And based on that,
8 the examiner made certain amendments to the claim which are
9 then reproduced below, but there's no reference at all to
10 whether that additional sentence added to the specification
11 constituted or didn't constitute new matter, whether the
12 examiner ever actually scrutinized that assertion by Sonos.
13 There's simply no reference to it as counsel has noted.

14 The only indication is they asked for the amendment,
15 the amendment was made. Unclear, it's a complete black box
16 what the examiner did --

17 THE COURT: Well, but the way the PTO apparently
18 works is the PTO must have felt that it was -- that amendment
19 was allowed because it's in the specification.

20 MR. LORDGOOEI: And our point has been, Your Honor,
21 that the -- pointed to the examiner, to the provisional. But
22 that's highly misleading, because where it shows up in the
23 provisional is in the context of zone grouping, not zone
24 scenes. And unless you spend a lot of time really examining
25 and studying that provisional patent and really understanding

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1 what they're saying, including a couple of pages prior to the
2 sentence in the provisional where it says you shouldn't use
3 this for zone scenes, unless you go through that level of
4 analysis and critique, you're not going to pick up this
5 issue.

6 THE COURT: Counsel says that there are other
7 places -- you don't even need this sentence here -- other
8 places in the specification that support overlapping zone
9 scenes.

10 MR. LORDGOOEI: And we've talked about every single
11 one of those in our prior briefing. It's throughout the
12 briefing that's before Your Honor. We don't believe there's
13 sufficient support, explicit support --

14 THE COURT: Well, is there any -- is there a single
15 instance?

16 MR. LORDGOOEI: We don't believe there is.

17 And you know, I'll point Your Honor back to the
18 Federal Circuit case law that says it's not enough for there
19 to be disclosure through inference. It has to be an express
20 explicit disclosure of the inventive concept, and there simply
21 is nothing that we've seen that they've pointed to for
22 overlapping zone scenes in the written description, and that's
23 why everyone, including Your Honor, keeps going back to this
24 one sentence.

25 THE COURT: Well, we're going to take a break, and

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1 then I got an 11:00 o'clock calendar.

2 When we come back, we'll turn to some -- what would
3 you like to, in the 40 minutes or so I have left, what would
4 you like to address?

5 MR. PAK: Your Honor, from Google's perspective,
6 we'd like to address our JMOL on invalidity of the claims and
7 then the damages issue, Your Honor. Those are the two issues.

8 THE COURT: There's not enough time for both of
9 those, so you might pick one of those two.

10 MR. PAK: Thank you, Your Honor.

11 THE COURT: From your point of view, what would you
12 like to discuss?

13 MR. SULLIVAN: Your Honor, I'm going to -- Sean
14 Sullivan here. I'm going to shoot for the injunction, if you
15 will.

16 THE COURT: All right. We'll try to do both. We
17 won't have as much time, because I've got an 11:00 o'clock
18 calendar, but we'll do our best.

19 All right. Thank you.

20 MR. SULLIVAN: Thank you, Your Honor.

21 MR. PAK: Thank you, Your Honor.

22 THE COURTROOM DEPUTY: Court is in recess.

23 (A recess was taken from 9:56 a.m. to 10:11 a.m.)

24 THE COURT: All right. Let's hear about invalidity.

25 MR. SULLIVAN: Well, actually, Your Honor, can we do

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1 injunction first, since we spent so much time on their
2 affirmative defense?

3 THE COURT: No, injunction you only get to if they
4 lose on their affirmative. Trial is not over yet, and you
5 haven't won yet. You've just won the jury part.

6 So I want to hear -- I'm going to give them a few
7 minutes, and then we'll try to save time for injunction.

8 MR. SULLIVAN: Thank you, Your Honor.

9 THE COURT: Go ahead, Mr. Pak.

10 MR. PAK: Thank you, Your Honor.

11 May I hand up the slides? I apologize.

12 THE COURT: I don't want to see any slides.

13 MR. PAK: Okay.

14 THE COURT: I want you to just tell me the --

15 MR. PAK: I will be as focused as I can.

16 Your Honor, we have really four arguments to make
17 here, even under --

18 THE COURT: No, give me your best -- the jury
19 rejected your obviousness grounds.

20 MR. PAK: Yes.

21 THE COURT: You wanted a trial. You wanted a jury.
22 You lost.

23 MR. PAK: Yes, Your Honor.

24 THE COURT: You lost.

25 Now, you want to relitigate it like it's summary

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1 judgment. You should have just said, I don't want a jury.
2 You might have won. But I'm not going to overrule a jury
3 verdict unless it is crystal clear that the jury was wrong.
4 And I listened to your argument, and you had a good argument,
5 but it is not necessarily a winner. The jury did not accept
6 it, and it has to be by clear and convincing evidence.

7 So why don't you just be a good citizen, salute and
8 say, the jury has spoken, the very jury you wanted, you
9 wanted, and now in fact you lost and you won't accept the
10 verdict. That's what I see here. I see a big firm with an
11 armada of lawyers wants a jury, thinks they're great, they're
12 going to win, but they lose. Now, you won't accept that
13 verdict.

14 Okay. Give me your single best argument on
15 invalidity.

16 MR. PAK: My single best argument, Your Honor, is
17 this. The other side's arguments on JMOL -- and just to
18 remind Your Honor, we did argue about this on summary judgment
19 so we thought the issue was ripe for Your Honor's
20 consideration. The reason why they say our invalidity
21 arguments must fail is because the only evidence we put in
22 front of the jury on this idea of having multiple overlapping
23 zone scenes began with the all-party -- all-zones party mode
24 in Sonos 2005. So they're saying that every one of our
25 invalidity theories will fail if they convince the jury that

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1 the all-party -- all-zones party mode was not a zone scene,
2 and that's categorically untrue, Your Honor. So that's the
3 point that I want to make very clear today.

4 The most important piece of evidence that came in
5 that we don't think any reasonable jury could have ignored is
6 the sworn testimony of Mr. Lambourne about the prior art forum
7 posts. And Your Honor recalls that I asked him specifically,
8 and I showed him page, after page, after page of the Sonos
9 forum posts, which we all agree is prior art, and he admitted
10 under oath that they disclosed multiple overlapping zone
11 scenes, that other people had publicly posted the idea of
12 having multiple overlapping zone scenes that are saved for
13 later. We went through the example --

14 THE COURT: Well, that was after the product came
15 out, right, the Sonos product came out?

16 MR. PAK: No it's not, Your Honor, because remember,
17 this is going back -- these Sonos forum posts, this is going
18 to -- are you talking about the Sonos 2005 system?

19 Yes, so after the Sonos 2005 system comes out --

20 THE COURT: Right.

21 MR. PAK: -- but before the invention date of any of
22 these two patents, people on the web through their Sonos forum
23 posting website, were disclosing not only the idea of having
24 multiple overlapping zone scenes that are saved for later, but
25 they were also proposing exactly the same solution.

1 And we saw, for example, macros and presets that
2 were being discussed at length.

3 THE COURT: Well, was there any evidence that that's
4 what eventually got used was macros?

5 MR. PAK: Yes, Your Honor. So this is --

6 THE COURT: I don't think that -- I don't remember
7 that connection being made.

8 MR. PAK: Let me show you -- I apologize for using
9 slides.

10 THE COURT: Let's even assume later on that's
11 what -- the law requires that it not just be the idea, but
12 that the person of ordinary skill in the art would have had a
13 reasonable expectation --

14 MR. PAK: Yes, sir.

15 THE COURT: -- that it would have succeeded.

16 All right. So all you got are crazy guys who are
17 talking on a forum post. For all I know, they could be
18 anybody. They could be people who think they're going to the
19 moon next week, and we don't know their credentials. We don't
20 know if they're somebody skilled in the art. It's just yak,
21 yak, yak on the -- so how can that translate to somebody
22 skilled in the art?

23 MR. PAK: So (inaudible) 11. Let's take a look at
24 the evidence, Your Honor. So this is what the evidence came
25 in on this point.

1 Trial testimony from Mr. Lambourne at page 541,
2 line 2 through 7:

3 "So Mr. Greenwood, in this prior public posting
4 about the Sonos 2005 system, was describing the same type of
5 problem that you were trying to solve with zone scenes and
6 suggesting macros, which is a similar solution to what you had
7 in mind for that functionality, correct?

8 "Answer: In broad terms, yes. As an outcome, yes."

9 And if you turn to the slide right before that,
10 Mr. Wilson.

11 These are not speculation, Your Honor. This is
12 TX-3930 at page 2, this is prior art, where he says: "I find
13 myself manually linking and unlinking setting volumes in a
14 very repetitive way. I would think that a macro-type
15 function, which is a piece of software, will be able to save
16 those manual steps into a single selection of a favorite."

17 And then it's crystal clear on Slide 9, right before
18 then: "So people" -- this is at trial transcript, page 538,
19 line 4, to 539, line 4: "So people were suggesting ideas how
20 to use macros and presets to improve upon the Sonos 2005 prior
21 art system?

22 "Yes.

23 "Question: So if I was in summer I could set up my
24 summer party mode, and then I could set up a winter party mode
25 that would be saved for later use, correct?

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1 "Answer: Yes.

2 "Question: And again, that is consistent with the
3 examples that you gave in your patents of zone scenes,
4 correct?

5 "Answer: There can be more than one setup, yes."

6 So as Your Honor recalls, Mr. Lambourne is not an
7 engineer. He never wrote code. He's not a programmer of any
8 kind. There is no disclosure in the patent, and this is the
9 *Publicover* case that we had cited to Your Honor, Your Honor
10 instructed the jury that one of the things you have to look at
11 is the level of disclosure in the patent specification to
12 assess whether the prior art also provides written description
13 or enabling support.

14 Here we have Mr. Lambourne himself admitting that
15 the idea of having multiple overlapping zone scenes was
16 already in the prior art, that people were posting, many of
17 them were engineers, Your Honor, we have evidence of that,
18 were suggesting using macro-type functions and presets, which
19 was not only the solution that he had in mind when he came up
20 with these ideas, but he says those are the kinds of examples
21 that he provided in his patents.

22 There is no description of any particular type of
23 source code other than the general idea of using things like
24 macros and presets. If that is enabling written disclosure in
25 the patents, then as a matter of law, Your Honor, based on

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1 this record -- and again, even if the jury had discounted
2 anything that our expert said or anything that Dr. Almeroth
3 said, we have sworn testimony from the man who knows his pants
4 best saying, my idea, my solution were all present in these
5 prior art --

6 THE COURT: All right. I got to let the other side
7 respond so we can save time for injunctive relief.

8 Okay. Your point.

9 MR. SHEA: Thank you, Your Honor.

10 I mean, my point is just a rebuttal to Mr. Pak's,
11 Your Honor. I mean, there was more than sufficient evidence
12 here that there -- that there are five different possible
13 problems with their obviousness combinations, right? I mean,
14 the jury could have found that Sonos 2005 didn't have what
15 they say they had, they could have found that their secondary
16 references don't overcome those problems, they could have
17 found no motivation, they could have found no reasonable
18 expectation of success, they could have found secondary
19 considerations. There is sufficient evidence in the record on
20 all of those points that supports a finding of nonobviousness.

21 Now, I want to just -- maybe the one point I want to
22 address, Your Honor, is this is not just about whether or not
23 Sonos 2005 had a single zone scene. It didn't, and there's
24 more than sufficient evidence to show that it didn't. But
25 that's not the only evidence that Sonos and Dr. Almeroth

1 relied on for nonobviousness. He also relied on evidence that
2 there was no separation between creation of groups and
3 invocation of groups, and there's testimony throughout and
4 evidence that the party mode didn't have that separation.
5 Dr. Almeroth testified that that's a requirement of the
6 claims. We saw that in the claims. The claims actually tell
7 you you've got to create it, then you've got to select it,
8 then you've got to invoke it.

9 Google and Dr. Schonfeld relied exclusive on Sonos
10 2005 system for that functionality. They didn't even -- they
11 didn't point to Sonos forums for that functionality. They
12 didn't point to any of these other secondary references for
13 that separation functionality. I went back and looked at the
14 transcript and Dr. Schonfeld's testimony. He never talked
15 about that concept one time in his testimony because they
16 relied on Sonos' 2005 system for that. And the evidence
17 shows, or at least there's sufficient evidence to support a
18 jury finding that there was no separation, as required by the
19 claims, in Sonos' 2005 system.

20 So this whole idea of macros, it collapses, because
21 that's all those things say is there's a macro, but it doesn't
22 say a macro to do what. And in Google's brief they say, well,
23 the macro would be to just use the functionality in Sonos'
24 2005 system. Sonos' 2005 system didn't have the
25 functionality, because they didn't have this separation

1 between creation and invocation. They didn't have indication
2 to be added to a group, followed by selection and operating in
3 standalone mode during -- until selection, and then followed
4 by an instruction to invoke the group. They did not have that
5 separation.

6 And so the macros, even with the macros in the
7 forums, it just does not overcome the deficiencies that are in
8 that Sonos 2005 system. That's what Dr. Almeroth testified to
9 at the trial. The jury reasonably accounted for that in their
10 verdict to find nonobviousness amongst motiv -- the lack of
11 proof that Google put forth on motivation, on reasonable
12 expectation of success and the affirmative evidence on those
13 things, the skepticism, the people questioning whether this
14 made sense; the evidence showing that Sonos' 2005 grouping was
15 already very, very successful, popular, highly praised, and
16 why would a person of ordinary skill in the art in 2005 be
17 motivated to make changes to that.

18 So for all those reasons, Your Honor, I mean, in
19 order to overturn this jury verdict, Google would have to
20 establish that there's only one reasonable conclusion on every
21 single one of those five points, and they just simply can't do
22 that given the evidence in this case.

23 THE COURT: I got to go to the injunction point, so
24 I'm not going to make a ruling right now.

25 MR. PAK: Thank you, Your Honor.

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1 MR. SHEA: Thank you.

2 THE COURT: I am going to make one observation if
3 this issue gets to the Federal Circuit, which is this: I did
4 tell the jury that in determining how obvious something would
5 have been to someone of ordinary skill in the art, the jury is
6 entitled to consider the skimpiness with which the
7 specification teaches the supposed invention. And in this
8 case it is skimpy, and in this case in my mind it would not
9 have taken much to show that somebody of ordinary skill in the
10 art would have understood this supposed invention.

11 That, however, we are dealing with a jury verdict
12 that Google wanted. Google wanted a jury. Google thought its
13 lawyers, the armada, would win the day, but they lost on this
14 issue. We have to respect the jury -- it's in the system.
15 It's in the statutes. It's in the Constitution. And even if
16 I disagree with the verdict, which I'm not saying I do, but if
17 I did, I cannot overrule it just on that ground. It has to be
18 a very clearcut case, where the evidence was clear and
19 convincing that it was invalid. And I'm not saying one way or
20 the other yet on that, but it's not as easy as Mr. Pak wants
21 it to sound.

22 Okay. We're going to injunction.

23 MR. PAK: Thank you, Your Honor.

24 MR. SHEA: Thank you, Your Honor.

25 MR. SULLIVAN: Thank you, Your Honor. Could we do

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1 slides, or no slides?

2 THE COURT: No, I don't want any more slides.

3 MR. SULLIVAN: You got it, Your Honor.

4 THE COURT: I don't want slides.

5 MR. SULLIVAN: All right. Try to get through this
6 as quick as I can for you.

7 Sean Sullivan on behalf of Sonos.

8 THE COURT: Well, what do you think are your best
9 points for an injunction?

10 MR. SULLIVAN: Well, I think, you know --

11 THE COURT: I understand you won, and so the '885 or
12 maybe the speakers go off the shelf because they have to be
13 enjoined, but what do you think their best point is, and
14 what's your answer?

15 MR. SULLIVAN: I think my best point is that we're
16 direct competitors, right? Sonos practices its invention.
17 This is a critical feature, so there is a drive for demand
18 here with this feature. There's a causal nexus between the
19 harm and the infringement.

20 This is a feature that Google tried to remove,
21 couldn't remove it. Right? Tried to do a redesign instead of
22 just dropping it all together. They could have just removed
23 it entirely, gone with dynamic grouping instead of static
24 grouping or zone scenes. They didn't do that. So obviously
25 it's important to them.

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1 THE COURT: If they could do zone scenes that don't
2 overlap, that would evade the statute. I mean, the claims.

3 MR. SULLIVAN: It would, but their own witness,
4 Tomer Shekel, said that would be a poor user experience.

5 THE COURT: Well, but they would still -- yes, may
6 be, but they would -- it could be done that they could
7 continue to sell their speakers but disable the ability to do
8 overlapping zone scenes.

9 MR. SULLIVAN: Right. So then the injunction
10 wouldn't hurt them, Your Honor.

11 You put the injunction in so they can't use this
12 invention. We -- it's a constitutional right to exclude here.
13 That's what we want.

14 Google's a giant. We're 1-1000th of a size. We
15 can't compete with Google. They're selling their products at
16 a loss. They don't make any money on these products. They're
17 killing us in the marketplace with this infringement. We have
18 to compete against an invention we practice ourselves. It has
19 all the benchmarks for why an injunction should be issued in
20 this case.

21 THE COURT: Okay. I'm going to give you rebuttal.

22 Why shouldn't the Court, if you lose on your
23 defenses, issue an injunction to take these speakers off the
24 market unless you disable the overlap function?

25 MS. COOPER: Your Honor, Lindsay Cooper for Google.

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1 The Federal Circuit has weighed in on this exact
2 issue. They're asking for an injunction that applies to the
3 full products. The issue, the feature in this case is a very
4 narrow --

5 THE COURT: Well, that's what I'm saying, enjoin you
6 from -- I could enjoin you from using the overlap function.
7 You could still have zone scenes, but you couldn't have zone
8 scenes that overlap. What's wrong with that?

9 MS. COOPER: In order -- in order to do that, they
10 would need to meet all of the injunction factors to begin
11 with. We don't believe they have. They have --

12 THE COURT: What are they missing here? They're
13 competitors. You're killing them in the market.

14 MS. COOPER: They need to prove irreparable harm,
15 and specifically they need to prove causal nexus. They need
16 to prove that there's a connection between the claimed feature
17 and demand for the products. There is literally no evidence
18 of that in the record right now.

19 THE COURT: Well, if there's not, you lost the case.
20 They don't have to prove it. You're the infringer. You're
21 the bad actor here, not the-- the plaintiffs won the case.

22 MS. COOPER: It's their --

23 THE COURT: They won. I mean, you're the loser and
24 the infringe -- not just the loser, the infringer.

25 And by the way, given that the jury verdict came

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1 down against you on '885, you are becoming a willful
2 infringer.

3 MS. COOPER: I disagree with that, Your Honor. But
4 at the injunction phase, there is no presumption of
5 irreparable harm based on an infringement verdict alone.
6 Their injunction case boils down to an infringement verdict
7 plus very limited evidence of competition. That is not enough
8 for an injunction following eBay.

9 THE COURT: You won't even pay the money. You won't
10 even pay a royalty. You don't want to pay the -- you say the
11 jury got it wrong and you're not going to pay. So in the
12 meantime, they -- they're suffering in the marketplace.

13 MS. COOPER: We believe the jury got it wrong on
14 damages, Your Honor.

15 THE COURT: Yeah.

16 MS. COOPER: If it comes to it, we are willing to
17 design around. If Your Honor believes an injunction is
18 appropriate, if Your Honor believes they've established
19 irreparable harm and causal nexus, we're prepared to design
20 around. We're already working on it. The design-around we
21 would implement would be --

22 THE COURT: You should not be -- see, what you're
23 saying here is you're blaming me. You're trying to set it up
24 so later you'll say, well, Judge, we told you.

25 You should be making your own decision and instead

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1 of waiting for me to get an order out when I got a million
2 cases. You should -- and don't come back later and say, oh,
3 we told you, Judge, we were -- if you told us to design
4 around, we would. That's not good enough. You ought to be
5 thinking about designing around now, and the way to do it is
6 to disable the overlap function.

7 MS. COOPER: We are working on it, and that's
8 exactly what we plan to do if the verdict stands.

9 THE COURT: Well, you know, that will be two years
10 before we know what the Federal Circuit says.

11 MS. COOPER: Well, we've --

12 THE COURT: You mean if I uphold the verdict. Well,
13 there's a good -- what do you mean, if the verdict stands?
14 Right now the verdict has ruled against you.

15 MS. COOPER: We have a number of --

16 THE COURT: You should not be saying, oh -- you're
17 saying, you know, if the Judge doesn't bail you out, you will
18 design around.

19 MS. COOPER: Right. And we're actively working on
20 it.

21 THE COURT: Well, you should be. And to my mind
22 it'd be an easy thing to disable the overlap function. It
23 wouldn't be -- it might be a bad user experience, but if so,
24 that's -- until this patent gets invalidated somehow, maybe
25 that's the way you gotta go.

1 And you got a willfulness problem, too.

2 I have a different question is -- and that is, I had
3 thought, but I think Sonos has talked me out of it because you
4 don't want it anymore, I had thought it would be best to
5 explain to consumers that they are buying an infringing
6 product; that a jury has determined that Google's speakers
7 infringe if used in groups of three or more. But Sonos says,
8 no, they don't want that, because you say they're not the
9 infringers. Well, okay.

10 Now, you had a long list of lawyers and everything,
11 and I'm not going to do a notice to all those people, but the
12 consumers I wanted to protect from something, some accusation
13 by Sonos that they were bad people. But you don't want that,
14 is that correct?

15 MR. SULLIVAN: Well, I'm happy to -- you mean giving
16 notice to the consumers about Google's infringement?

17 THE COURT: No, no, no, not at all. Giving notice
18 to the consumers that if they use them in groups of three or
19 more. It's use within the statute; use. Make or sell.

20 MR. SULLIVAN: Yeah, make, use or sell.

21 THE COURT: So if the consumer is using them, why
22 wouldn't that be infringement?

23 MR. SULLIVAN: Well, I don't want to threaten
24 consumers, Your Honor.

25 THE COURT: See, I know you don't. So now I'm

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1 giving up on my idea because you -- you don't want to do that.

2 Okay, that's fine. That's one less step I gotta worry about.

3 I think there's a good chance here, unless I somehow
4 grant one of these affirmative defenses -- which I am not
5 saying yes to or no to. I gotta think it through. There's a
6 good chance I'm going to enjoin, I'm going to order you to
7 suspend and get rid of the overlap function. So you should be
8 thinking about that.

9 And even as we speak now, you are a willful
10 infringer from the moment of the jury verdict, at least for a
11 reasonable time thereafter. You should not be waiting and
12 saying later you were waiting on the poor judge to make a
13 decision. It could be months before I can get an order out.
14 It could be a week, I don't know. But I do have other cases.
15 You saw today your law firm has got me in other cases. So I
16 have a lot of cases to deal with, and I can't just say that
17 I'll get you an order within one or two weeks.

18 So you should be thinking, am I a willful infringer.

19 Is that Mr. Google back there? Yes, you should be
20 thinking, is Google a willful infringer.

21 All right. Go ahead.

22 MR. SULLIVAN: I don't have anything else, Your
23 Honor.

24 THE COURT: All right.

25 MS. COOPER: Your Honor, I would just ask if the

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1 Court is inclined to go down that road and issue some form of
2 injunctive relief, we just want to make sure the language is
3 clear there are multiple ways to do overlapping grouping, some
4 of which were not accused in the case. For example, dynamic
5 grouping. I just want to make sure that the injunction order
6 is precise and --

7 THE COURT: Well, I don't remember it well enough
8 anymore to say whether it would or -- I thought dynamic was
9 where you had whatever you were listening to at the moment was
10 dynamic, but the -- I don't remember well enough now. I'm not
11 going to say without going back, and I'll just issue an order
12 and Google will have to comply.

13 See, you're trying to -- give me again -- how would
14 you -- tell me how you would write the order.

15 MS. COOPER: That the patent relates to saving
16 overlapping groups. Dynamic grouping is where a user can
17 create different groups on the fly and they're not saved. So
18 --

19 THE COURT: Can I see that chart, that famous chart
20 you made for me? I don't see it anymore. The one that was
21 used through the trial, that one.

22 How would you write the order? If I say to you,
23 stop overlap, how would you write it?

24 MS. COOPER: I would suggest that it say, um -- you
25 know, it could just say Google is ordered to design around the

1 patent. There's --

2 THE COURT: No, you tried that and lost.

3 MS. COOPER: But, but --

4 THE COURT: I'm not going to do that again, because
5 you pulled a trick and the jury saw through it. So I'm not
6 going to do that. To my mind, you gotta get rid of overlap to
7 avoid this patent.

8 All right. We're -- which one of these is talking
9 about saving in the '855?

10 MR. PAK: Your Honor, it's in the definition of Zone
11 C, it talks about previously saved.

12 THE COURT: Yes.

13 MR. PAK: This is Sean Pak for Google.

14 THE COURT: Well, I'm not going to opine on what
15 you're asking me. I -- you need to root out of your -- I'm
16 not ordering this yet, but if I do, it's going to be an
17 injunction ordering you to -- you can continue to sell, but
18 you gotta take out the overlap capability. And that, to my
19 mind, would solve this problem, but I'm not -- I don't want
20 any cutesy. I don't want any cutesy, where you come back and
21 say, well, overlap 1 is okay and overlap 2 is not. Then I may
22 just enjoin the entire line of products. So no more cutesy.
23 The jury saw through your first attempt.

24 MR. PAK: Your Honor, on the -- just to make the
25 record clear, I think it's -- and I don't think we're going to

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1 hear any disagreement. There are two types of grouping
2 functionality in Google's products. There a something called
3 dynamic, where you can group, where you don't save the groups.
4 And then there's something called static, where you group them
5 and you save them. The only accusations of infringement were
6 directed toward static groups. So to the extent there is an
7 injunction, Your Honor -- and we're going through it, the
8 exercise on our own -- it would be designing out the
9 overlapping functionality for the static groups.

10 THE COURT: Well, I am -- maybe that's right, but
11 maybe it's wrong, and I'm not prepared to accept your view
12 right now.

13 MR. PAK: Thank you, Your Honor.

14 THE COURT: All right. Enough on this?

15 Okay. I'll give each side a minute if you have
16 anything else procedural-wise to bring up so that I can --
17 because I got 15 minutes before my next hearing. Anything
18 else anybody wants to bring up? I don't have time to argue
19 any of the motions, but anything procedural?

20 MR. SULLIVAN: Nothing from Sonos, Your Honor.

21 MR. PAK: No, Your Honor.

22 Thank you very much for entertaining our argument.

23 THE COURT: All right. Thanks. Good luck to both
24 sides.

25 MR. SULLIVAN: Thank you, Your Honor.

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1 (Proceedings concluded at 10:40 a.m.)

2 * * * * *

3 CERTIFICATE OF REPORTER

4 I, Stephen W. Franklin, Registered Merit Reporter, and
5 Certified Realtime Reporter, certify that the foregoing is a
6 correct transcript, to the best of my ability, from the record
7 of proceedings in the above-entitled matter.

8 Dated this 12th day of AUGUST, 2023.

9

10 /s/Stephen W. Franklin

11 Stephen W. Franklin, RMR, CRR

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